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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1254.

P. C. KIMMISH, PLAINTIFF IN ERROR,

vs.

JOHN J. BALL AND HENRY TIENKEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 9, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 20, 1888.

1 *Transcript of Record and Certificate of Division.*

In the Circuit Court of the United States for the Southern District of Iowa, Western Division.

Be it remembered that on the 29th day of September, 1887, the plaintiff filed his petition as follows:

Petition.

September Term, 1887.

P. C. KIMMISH, Plaintiff,

vs.

JOHN J. BALL & HENRY TIENKEN, Defendants.

For cause of action herein plaintiff states that on or about the 20th day of June, 1885, the defendants were the owners of and had in their possession and control a herd of Texas cattle, and that said cattle had not been wintered north of the southern boundary of the States of Missouri or Kansas, and were purchased at or near Fort Smith, Arkansas, on or about June 20th, 1885; that said cattle, being in the possession and under the control of the defendants, were allowed and permitted by them to run at large in Union township,
Harrison county, Iowa, contrary to the provisions of section
2 IV, chapter 185, of the acts of the twelfth General Assembly,
the same being section 4059 of the Code of Iowa; that said cattle were infected by a disease known as "Texas cattle fever."

That by reason of the premises said disease was spread and disseminated among plaintiff's cattle, whereby they sickened and died, and plaintiff has sustained damages in the sum of five thousand dollars, for which amount, with interest and costs, he prays judgment.

S. H. COCHRAN AND
FLICKINGER BROS.,
Attorneys for Plaintiff.

To which petition, on the 30th day of September, 1887, defendants file their demurrer as follows:

Demurrer.

September Term, 1887.

P. C. KIMMISH, Plaintiff, *vs.* J. J. BALL & HENRY TIENKEN.

And now come the defendants and demur to plaintiff's petition herein filed upon the following grounds:

1st. That the matters and things alleged and set out in said petition do not constitute any cause of action or ground for recovery against these defendants or either of them, in that they had a lawful and constitutional right to do all and singular the matters and things therein alleged against them.

3 2nd. For that sections 4058 and 4059 of the Code of Iowa on which plaintiff's right of action in said court is based, is in conflict with section VIII, article I, of the Constitution of the United States, in that the Legislature of the State of Iowa in said section undertook to regulate and interfere with interstate commerce.

3rd. For that by section VIII, article I, of the Constitution of the United States the sole and exclusive right and power is conferred upon the Congress of the United States to regulate commerce among the several States, and the provisions of sections 4058 and 4059 of the Code of Iowa are an attempt of the State of Iowa to interfere with the right to regulate interstate commerce exclusively conferred upon the Congress of the United States.

4th. For that it is provided by section I, article I, of the bill of rights of the constitution of the State of Iowa that among the inalienable rights of all men is that of acquiring, possessing, and protecting their property, and for that it is provided by section II, article IV, of the Constitution of the United States that each State shall be entitled to all the privileges and immunities of the citizens, of the several States, and sections 4058 and 4059 of the Code of Iowa are repugnant to and in conflict with the aforesaid provisions of the constitutions of the State of Iowa and of the United States, in that they create a disability which reaches to cattle in the State of Texas and in States south of the southern boundary of Missouri and Kansas, without regard to their physical condition, and does not relate to the same class of property in other States of the Union or owned by citizens of other States of the Union.

SAPP & PUSEY,
Attorneys for Defendants.

And the issue being joined on the demurrer and the court being fully advised in the premises, on the 27th day of March, A. D. 1888, the following proceedings were had thereon:

4 *Certificate of Division.*

In the Circuit Court of the United States, Southern District of Iowa, Western Division.

At a circuit court of the United States begun and held at Council Bluffs, for the southern district of Iowa, western division, on Tuesday, the 27th day of March, A. D. 1888, being the March term.

Present: The Hon. J. M. Love and O. P. Shiras.

P. C. KEMMISH *vs.* JOHN J. BALL and HENRY TIENKEN.

5 This is an action for damages.

The plaintiff, in his petition, states that on the 20th of June, 1885, the defendants were the owners and had in their possession and control a herd of Texas cattle which had not been wintered north of the southern boundary of the States of Missouri or Kansas, and which

were purchased by defendants at or near Fort Smith, Arkansas, in June, 1885; that said cattle, being in the possession or under the control of defendants, were allowed and permitted by them to run at large in Harrison county, State of Iowa, contrary to the
5 provisions of section 4059 of the Code of Iowa; that said cattle were infected with the Texas cattle fever, which they spread and disseminated among plaintiff's cattle, which sickened and died, to the damage of plaintiff.

The defendants demur to plaintiff's petition upon the ground that sec. 4058 & 4059 of the Code of Iowa are repugnant to and in conflict with sec. 8, art. 1, of the Constitution of the United States, and are unconstitutional, in that the Legislature of Iowa in said sections undertakes to regulate and interfere with interstate commerce.

Defendants demur to plaintiff's petition upon the further ground that sections 4058 & 4059 of the Code of Iowa are repugnant to and in conflict with sec. 2 of art. 4 of the Constitution of the United States relative to the privileges and immunities of citizens in the several States, and are therefore unconstitutional. The plaintiff joined in the demurrer.

Sections 4058 & 4059 of the Code of Iowa are as follows:

"SEC. 4058. If any person bring into this State any Texas cattle he shall be fined not exceeding $1,000 or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter north of the southern boundary of the State of Missouri or Kansas: Provided, That nothing herein contained shall be construed to prevent or make unlawful the transportation of
6 such cattle through this State on railways or to prohibit the driving through any part of this State or having in possession any Texas cattle between the first day of November and the first day of April following."

"SEC. 4059. If any person now or hereafter has in his possession in this State any such Texas cattle he shall be liable for any damages that may accrue from allowing said cattle to run at large and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section."

The case coming on to be tried at this term upon said demurrer, it occurred as a question whether sections 4058 and 4059 of the Code of Iowa or either of them were repugnant to the provision of sec. 8, art. 1, of the Constitution of the United States relative to the regulation of commerce among the States, and therefore unconstitutional, and whether sections 4058 and 4059 of the Code of Iowa or either of them were repugnant to sec. 2 of art. 4 of the Constitution of the United States relative to the privileges and immunities of citizens in the several States, and therefore unconstitutional.

On which questions, so far as they relate to sec. 4059 of the Code of Iowa, the opinions of the judges were opposed; whereupon, the plaintiff electing to stand on his petition, judgment was en-
7 tered in favor of defendants, sustaining said demurrer according to the opinion of the presiding judge.

Whereupon, on motion of the plaintiff, by his counsel, that the points on which the disagreement had happened may during the term be stated under the direction of the judges and certified, under the seal of the court, to the Supreme Court, to be finally decided—

It is ordered that the foregoing facts and the following questions be certified according to the requests of the plaintiff, by his counsel, and the law in that case made and provided, to wit:

1st. Is sec. 4059 of the Code of Iowa repugnant to and in conflict with the provisions of sec. 8 of art. 1 of the Constitution of the United States relative to the regulation of commerce among the several States and by reason thereof unconstitutional?

2nd. Is sec. 4059 of the Code of Iowa repugnant to or in conflict with sec. 2 of art. 4 of the Constitution of the United States relative to the privileges and immunities of citizens in the several States and by reason thereof unconstitutional?

Witness our hands and the seal of this court this 30th day of March, A. D. 1888.

J. M. LOVE.
O. P. SHIRAS.

8 And thereafter and on the 1st day of September, 1888, plaintiff sues out a writ of error to the Supreme Court of the United States, which is allowed by the court, as shown by the original hereto attached, as follows:

9 UNITED STATES OF AMERICA, } ss:
Southern District of Iowa, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between P. C. Kimmish, plaintiff, and John J. Ball and Henry Tienken, defendants, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Samuel F. Miller, senior associate and

acting Chief Justice of the said Supreme Court of the United States, at Council Bluffs, in said district, this 1st day of September, 1888.

[Seal of Circuit Court of the United States, Southern District of Iowa.]

H. K. LOVE, *Clerk*,
By F. M. HUNTER, *Deputy*.

Allowed by—
J. M. LOVE, *Judge*.

[Endorsed:] No. —. United States circuit court, district of Nebraska. P. C. Kimmish *vs.* John J. Ball & Henry Tienken. Writ of error. Filed Sept. 1st, 1888. H. K. Love, clerk.

10 And at the same time and date, to wit, September 1st, 1888, plaintiff files his citation, signed by the Hon. J. M. Love, judge, and supersedeas bond, approved by the court, as shown by the originals thereof, hereto attached, as follows:

11 THE UNITED STATES OF AMERICA, *District of* Nebraska, } *ss*:

To John J. Ball & Henry Tienken or Sapp & Pusey, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, wherein P. C. Kimmish is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, senior associate & acting Chief Justice of the Supreme Court of the United States, at Council Bluffs, Iowa, this 1st day of September, 1888.

J. M. LOVE, *Judge*.

12 [Endorsed:] No. —. United States circuit court, district of *Nebraska*. P. C. Kimmish *vs.* John J. Ball & Henry Tienken. Citation. Filed Sept. 1st, 1888. H. K. Love, clerk.

COUNCIL BLUFFS, IA., *Sep. 6th*, 1888.

We hereby accept service of the within citation with copy, place, & date above written.

SAPP & PUSEY,
Att'ys for J. J. Ball & H'y Tienken.

13 Know all men by these presents that we, P. C. Kimmish, —— ——, are held and firmly bound unto John J. Ball & Henry Tienken in the full and just sum of two hundred dollars, to be paid to the said John J. Ball & Henry Tienken, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between P. C. Kimmish, pl'ff, and John J. Ball & Henry Tienken, def'ts, judgment was rendered against the said plaintiff, P. C. Kimmish, and the said P. C. Kimmish having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John J. Ball & Henry Tienken, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said P. C. Kimmish shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Circuit Court of the United States, Southern District of Iowa.]

P. C. KIMMISH,
Per FLICKINGER BROS., *Att'ys.*
J. V. FLICKINGER, *Surety.*

Approved by—
H. K. LOVE,
Clerk U. S. Circuit Court, Southern District of Iowa,
F. M. HUNTER, *Deputy.*

[Endorsed:] No. —. United States circuit court, district of Iowa. P. C. Kimmish *vs.* John J. Ball, Henry Tienken. Bond. Filed Sept. 1st, 1888. H. K. Love, clerk.

14 Filed and entered of record Mar. 27th, 1888.
H. K. LOVE, *Clerk.*

UNITED STATES OF AMERICA, } ss:
Southern District of Iowa, }

I, H. K. Love, clerk of the circuit court of the United States in and for the southern district, western division, of Iowa, do hereby certify that the foregoing is a full, true, and correct copy of the certificate of division and record in the cause therein named, as full, true, and correct as the same appears from the original now remaining on file and the records in my office and under my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in Council Bluffs, in said district, this 1st day of October, A. D. 1888.

[Seal of Circuit Court of the United States, Southern District of Iowa.]

H. K. LOVE, *Clerk.*

Endorsed on cover: S. Iowa C. C. U. S. No. 1254. P. C. Kimmish, plaintiff in error, *vs.* John J. Ball and Henry Tienken. Filed October 9, 1888.

Supreme Court of the United States. October Term, 1888.

P. C. KIMMISH, Plaintiff in Error,
vs.
JOHN J. BALL and HENRY TIENKEN, Defendants in Error. } No. 1254.

It is hereby stipulated and agreed between the parties in the above-entitled cause that this case shall be submitted to the Court for its decision on the transcript of record, the brief and argument of the plaintiff in error and the brief and argument of the defendants in error at once, under rule 20.

It is further agreed between the parties that where the word Nebraska occurs, on the fifth and sixth pages of the record, it is purely a clerical, error and should read southern district of Iowa, western division, and we agree that the record may be treated as amended accordingly in that respect.

In witness whereof we have hereunto set our hands this 20th day of December, A. D. 1888.

P. C. KIMMISH, *Plaintiff in Error.*
By ISAAC H. FLICKINGER, *His Attorney.*
J. J. BALL & HENRY TIENKEN,
Defendants in Error.
By W. F. SAPP, *Their Attorney.*

[Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 1254. P. C. Kimmish, pl'ff in error, *vs.* Jno. J. Ball *et al.* Stipulation to submit under 20th rule and to correct record. Filed Dec. 24, 1888.

DEC 24
JAMES. H. McKENNEY
CLERK

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1254.

P. C. KIMMISH, PLAINTIFF IN ERROR,

vs.

JOHN J. BALL AND HENRY TIENKEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1254.

P. C. KIMMISH, PLAINTIFF IN ERROR,

vs.

JOHN J. BALL AND HENRY TIENKEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

STATEMENT OF THE CASE.

Section 4058 of the Code of Iowa provides:

"SEC. 4058. If any person bring into this State any Texas cattle he shall be fined not exceeding $1,000 or imprisonment in the county jail not exceeding thirty days unless they have been wintered at least one winter north of the southern boundary of the State of Missouri or Kansas: *Provided*, that nothing herein contained shall be construed to prevent or make uulawful the transportation of such cattle through this state on railways, or to prohibit the driving through any part of this State, or having in posession any Texas cattle between the first day of November and the first day of April following."

Section 4059 also further provides:

"SEC. 4059. If any person now or hereafter has in his possession in this State any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease known as Texas fever, and shall be punished as is prescribed in the preceding section."

Plaintiff brought his action against defendants as provided in Sec. 4059 of the Code of Iowa, alleging that defendants were the owners and had in there possession and control a herd of Texas cattle which had not been wintered one winter north of the southern boundary of the States of Missouri or Kansas; and had been purchased at or near Ft Smith, Ark. That said cattle while in the possession and under the control

of the defendants were allowed and permitted by them to run at large in Union Township, Harrison county, Iowa, contrary to the provisions of Section IV, Chap. 185 of the Acts of the 12th G. A., the same being Section 4059 of the code of Iowa. That said cattle being infected with a disease known as "Texas Fever," spread and disseminated such disease among plaintiff's cattle, whereby they sickened and died and damages were sustained in the sum of Five Thousand Dollars, for which judgment was prayed. (Transcript, page 1.)

To which petition defendants demurred upon the grounds that Sections 4058 and 4059 of the code of Iowa are unconstitutional and void in this:

1. That said sections are in conflict with Section 8, Art. 1, of the Constitution of the United States, in that they undertake to regulate and interfere with inter-state commerce.

2. Said sections are repugnant to and in violation of section 2, art. 4, of the Constitution of the United States, relating to the privileges and immunities of the citizens of the several states.

3. That said sections are also repugnant to section I, art. I, of the bill of Rights of the constitution of the State of Iowa, granting to its citizens the inalienable right of acquiring, possessing and protecting their property. (Transcript, pages 1 and 2.)

And issue being joined on the demurrer, and it coming on for hearing before their honors, O. P. Shiras and J. M. Love, a disagreement was had as to whether or not section 4059 of the Code of Iowa was in contravention of section 8,

art. 1 of the Constitution of the United States as to the regulation of commerce, or with section 2, art. 4 in relation to the privileges and immunities of the citizens of the different States. And said judges being divided in opinion, the opinion of the presiding Judge prevailed, and judgment was rendered on the demurrer in favor of the defendants. And at the request of plaintiff a certificate of division was granted certifying the question as to the constitutionality of section 4059 to this court for determination. Plaintiff now brings this cause in error to this court. (Certificate of Division, Transcript, pages 2, 3, 4 and 5.)

II.

ERRORS ASSIGNED.

Plaintiff assigns as error:

1. The court erred in sustaining the demurrer to the petition on the ground that section 4059 of the Code of Iowa was in conflict with section 8, article I, of the constitution of the United States.

2. The court erred in sustaining the demurrer on the ground that section 4059 of the Code of Iowa is in violation of section 2, article IV, of the constitution of the United States.

3. The court erred generally in sustaining the demurrer to plaintiff's petition.

III.

PLAINTIFF'S BRIEF AND ARGUMENT.

First— THE POINT IN CONTROVERSY.

As to the authority of the Judges to certify to a division, see Desty, pp. 844. 22, U. S. Stats., 172.

Plaintiff bases his action and right to recover on section 4059 of the Code of Iowa. Section 4058 is in no manner relied upon, but is referred to by defendants in their demurrer. The demuerrer admitted the truth of the allegations in plaintiff's petition. The court in sustaining the demurrer held that the facts stated were not sufficient to sustain the claim for damages. The certificate of division states that *the point on which the judges differed was as to the constitutionality of section 4059 only.*

This condition of the record presents but one question for the determination of this court, viz: *Is section 4059 of the Code of Iowa in violation of section II, article IV, or of section VIII, article I, of the constitution of the United States?* Section 4058 is not in controversy, and can only be referred to for the purpose of construing section 4059.

These sections prescribe certain criminal liabilities which is in no way or manner in controversy, the sole and only question being as to the *civil* liability mentioned in section 4059, the penal liability in the last mentioned section being separate and distinct from the civil. Even, if one is constitutional and the other unconstitutional this court would construe the one independent and separate from the other. See the following authorities:

Baldwin vs. Franks, 7th Sup. Court Rep. 656.

Presser vs. State of Ill., 6th Sup. Court Rep. 580.
Packet Co. vs. Keokuk, 15th Otto, 89.

Second— CONSTRUCTION OF THE STATUTE.

It will be observed that the word "such" is used in both sections 4058 and 4059; in the first section it plainly means cattle which have been wintered one winter north of the southern boundary of the state of Missouri or Kansas, and unless its meaning is ignored entirely such must be the construction as used in section 4059.

As to the term "*running at large*" asused in said section, it must be determined by the meaning given by the Supreme Court and Legislature of the state of Iowa, which has been done in section 1452 of the Code, which provides as follows:

"No stock or domestic animal except the male animals "mentioned in section 1447 of the Code shall be construed "as running at large so long as the same are upon unimproved "or uncultivated lands, and under the immediate care and con-"trol of the owner; or upon the public highway under like "care and control for the purpose of traveling or driving the "same."

As interpreted by the Iowa Supreme court. See Alger vs The M. & M. R. R. Co., 10 Iowa, 268. Corlis vs. Flaherty, 28 Iowa, 520.

From the above decisions and definitions and interpolations section 4059 construed plainly would read:

"If any person now or hereafter has in his possession in this state any Texas cattle which have not been wintered one winter north of the southern boundary of the State of Missouri or Kansas, he shall be liable for any damages that may accrue

from allowing said cattle to run at large and thereby spreading the disease among other cattle known as Texas fever; Provided, said cattle shall not be considered as running at large so long as they are upon unimproved or uncultivated lands and under the immediate care and control of the owner, or upon the public highway under like care and control for the purpose of traveling or driving thereon.

At common law, every man was required to keep his cattle within his own close, under penalty of answering in damages for injuries resulting from their running at large, except certain animals mentioned in the Code, Sections 1446 and 1447, cattle in Iowa are free commoners.

Wagner vs. Bissell, 3d Iowa, 396.

It will thus be seen that section 4059 is but a return of the statute law of the state to the rules and principles of the common law.

Section 1452 of the Iowa code provides, in addition to the provisions of section 4059, "That the owners of any stock "or domestic animal prohibited by law or police regulation "from running at large, shall be *liable for all damages* done "thereby while wrongfully remaining at large, upon the public "highway, or upon the improved or cultivated lands of an- "other."

Third— TEXAS CATTLE—WHAT ARE THEY?

Reference to leading works and reports on our cattle industries show that "Texas cattle" are synonymous with what are known as Mexican or Spanish cattle, which were originally imported into this country by the Spaniards from South America, and that the same breed now pastures on the

pampas of the Rio de la Plata and other great grazing regions of South America; that they are a *breed* or *variety* of cattle the same as the Jersey, Hereford or Shorthorn, with markings as distinct as either. To limit Texas cattle to cattle raised only in the state of Texas would be as absurd as to limit Jersey cattle to those only which had been raised on the Isle of Jersey. The name is not to be limited to any state boundaries, but is as broad as the public domain

See the following authorities:

2d Ann. Report State Veterinary Surgeon of Iowa for 1886. Page 16.

Report of Dr. Citmer, Veterinary Surgeon, to Com'r of Agriculture, Bureau of Animal Industry Report, 1884, P. 426.

Also report in same department for 1885, P. 310, and subsequent reports generally.

Fourth— THE REASON OF THE STATUTE.

Veterinary science, especialy that of modern date, has developed the fact that *all* cattle raised in what is known as the malarial region south of the southern boundary of Kansas or Missouri, possess the latent germs of a disease known as "Texas Cattle Fever," which is communicated to domestic cattle on their coming in contact with them, or when feeding on the same range or pasture; that frost dispels this infection and destroys the germs of the disease.

For an explanation of the disease, its origin and history we can do no better than to refer to the report of the state veterinarian of the state of Kansas as shown in the case of Mo. Pacific Ry. Co. vs. Finley, 16th Pac. Rep. 951, and the following works and authorities on veterinary science:

Second Annual Report of the State Veterinary Surgeon of Iowa for the year 1886. Page 16 and authorities cited 3, supra.

The limits prescribed are the frost limits, the period during which veterinary science has determined that the fever germs are innoxious.

Fifth— RULE OF CONSTRUCTION.

When the effect of a statute is drawn in question for its repugnancy to the federal constitution, if by a fair and reasonable interpretation, where the case is at all doubtful, it can be reconciled with the constitution, it ought to be done, and a contrary course pursued only where the incompatability is so great as to render it impossible to give it effect, without violating its provisions.

Adams vs. Story, 1 Paine, 76.

Cooley on Constitutional Limitations, 4th Ed., 182.

Gates vs. Brooks, 54 Iowa, 510.

Every statute is presumed to be constitutional. It must be clearly so to be unconstitutional.

Munn vs. Ill. 4th Otto, 113.

Statutes will be declared unconstitutional only when clearly necessary. Courts will if possible give such a construction as will evade the necessity of declaring them unconstitutional.

State of Iowa ex. rel. Wier vs. County Judge Davis Co., 2, Iowa, 280.

Stewart vs. Polk Co., 130 Iowa, 9.

Where part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void, if the provisions are distinct and severable.

Cooley on Const. Lim., 182.

Parley vs. D. M. & Ft. D. R. R. Co., 57 Ia., 393.

Penniman's Case, 13th Otto, 714.

Dewey vs. Small, 17 Howard P. R. 205.

A statute may be in part constitutional and in part unconstitutional, and if independant of each other, that which is constitutional may stand, while that which is unconstitutional may be rejected.

Allen vs. Leonard 13 Otto 83.

R. R. Co. vs. Schutte, id, 118.

Packet Co. vs. Keokuk, 5 Otto, 8 and 9.

Under these authorities the constitutionality of section 4058 need not be inquired into, nor what may be the legal effect of the latter clause of section 4059, prescribing a criminal liability. The civil and criminal part are separate and distinct and the case at bar pertains only to the civil remedy.

Every presumption must obtain in favor of the legality of the statute.

Sixth—AS EFFECTING THE PRIVILEGES AND IMMUNITIES OF THE CITIZENS OF THE SEVERAL STATES.

It will be observed that the statute makes no discrimination as to the citizens of any state. The language is: "*Any person.*" In the case at bar the offending parties are citizens of the state of Iowa. The force and effect of the

statute is operative against them as well as the *citizens of every state*. Its prohibition is *in rem* not *in personam*. It would be a narrow construction of the law which would limit the word "Texas cattle" to cattle raised in the state of Texas. The force and effect of the language of the statute must be determined by the custom, common usage and the meaning of the term among cattle men generally. As heretofore shown in Par. 3, "*Texas cattle*" *is synonymous with* "*Indian*," "*Cherokee*," "*Southern*" *or* "*Spanish cattle*," and has no relation to cattle raised within any state or locality.

In McCready vs. Virginia, 4th Otto, 391, this court held that the state of Virginia could prescribe who should plant oysters within the tide waters adjacent to her shores, because the fee of the soil was in the state and she had a right to bar the citizens of other states from the use and privilege thereof, the same as she could from planting corn within her boundaries. Much more could the soverign state of Iowa, within her boundaries, dictate the manner and use of foreign products on her soil and protect her citizens from damage and loss resulting therefrom.

A similar rule has been announced by this court in the famous Slaughter House cases, 16 Wallace and several other cases, which it is unnecessary to cite.

There is a serpent know as the "Texas Moccasin" which inhabits the marshes and swamps of the great malarial regions of the south whose bite is deadly as the Indian cobra. As well might it be claimed to be a restriction of the privileges and immunities of the citizens of the several states for the sovereign state of Iowa to make a law prohibiting the importation of such animals and allowing them to run at large as in

the case at bar. The statute is self-defensive self-protective and within the proper exercise of the police power granted to the states.

Seventh—AS AFFECTING INTERSTATE COMMERCE.

It is a well settled rule of law that in the exercise of its police power, *a state may restrain any and all live stock from running at large absolutely and unconditionally, and this without any reason or grounds than that of expediency as determined by their legislative will.*

Campen vs. Langley, 39 Mich., 451.

Wilcox vs. Hemming, 58 Wis., 144.

Rockwell vs. Nearing, 35, N. Y., 302.

Campbell vs. Evans, 45 N. Y., 356.

Cook vs. Gregg, 46 N. Y., 439.

Varden vs. Mount, 78 Ky. 86.

Roberts vs. Cogle, 38 Ill. 49.

The statute in controversy does not go that far, but permits them to run at large with a proviso that the owners shall respond in damages under certain conditions.

In the case of Mo. Pacific R. R. Co. vs Finley, 16 Pacific Rep., 951, a statute of Kansas much more stringent than the one at bar was held not to be in violation of the constitution of the United States, but a proper exercise of the police power. Horton, Chief Justice, says:

"We do not think the statute an intrusion upon the ex-"clusive domain of congress, and we think that the statute,

"aided by the testimony of the nature of Texas, splenic or "Spanish fever and of the peculiarities of Texas or Southern "cattle so diseased, against which this legislation is directed, "has for its substantial object the protection of the property of "the citizens of the state, and therefore ought to be sustained. "Clearly the object of the statute is not to obstruct Inter-state "commerce, but solely to exclude from the state cattle having "contagious and infectious diseases, and therefore wholly for "the protection of the property of the state against the noxious "acts of other persons, or such use of their property as is "dangerous to the cattle interests of the state. If this law is "not constitutional and within the police power of the state, "then the state is absolutely without power to protect the "property of its citizens. If this and similar statutes are in "conflict with the constitution of the United States, the state "is wholly disarmed and defenseless to exclude property from "the state that is dangerous and injurious to the property of "its citizens. We think the statute can be fully justified as a "legitimate exercise of the police power of the state, and that "it is not a usurpation of the power vested exclusively in con-"gress. *It is founded upon the law of self defense.*"

Defendants rely largely on R. R. Co. vs Husen, 5 Otto, 405, in which a Missouri statute bearing some resemblance to the one under consideration, was held to be in contravention of the provisions of the constitution of the United States.

On referring to that decision, it will be found that, excepting the *subject matter* of the statute, it bears *no resemblance to the case at bar.*

The Missouri statute under consideration in that case, absolutely prohibited the bringing of Texas, Mexican or

Indian cattle into the state for eight months in the year whether diseased or not. It provided "That no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the first day of March or the first day of Nov. in each year, by any person or persons whatsoever, provided that when such cattle shall come across the line of this state loaded on railway cars or steamboats and shall pass through this state without being unloaded, such shall not be construed as prohibited by this act, but the railway company or owners of the steamboat performing such transportation, shall be responsible for all damages which may result from the disease called Spanish or Texas fever, should the same occur along the line of such transportation.

The second section declares:

If any person shall bring into this state any Texas, Mexican or Indian cattle, in violation of this act, he or she shall be liable for all costs and damages sustained by disease communicated by said cattle.

In the language of Justice Strong, "This statute meets at the boundary of the state a large and common subject of commerce and prohibits its coming across the state line during two-thirds of the year." It has nothing in common with the statute in controversy.

This case was decided adversely to the staute for the reason that it was too broad and made no discrimination as to whether the cattle were diseased or not, and that "the reach of the statute was far beyond its professed object."

In the same opinion Justice Strong, quoting in part from Thorp vs. R. & B. R. R. Co., 27th Vt., 149 defines the police power of the state:

"To extend to protection of the lives, limbs, health, com-"fort and quiet of all persons, *and protection of all property* "*within the state*. According to the maxim, sic utere tuo ut "alienum, non laedas, which, being of universal application, *it* "*must, of course, be within the range of legislative action to* "*define the mode and manner in which everyone may so use his* "*own as not to injure others.* * * * That by the general "police power of a state, persons and property are subject to "all kinds of restrictions and burdens in order to secure the "general comfort, health and prosperity of the state: of the "perfect right of the legislature to do which no question ever "was or upon acknowledged general principles ever can be "made. * * * Under which a state may exclude from its "limits convicts, paupers and idiots and persons affected with "contagious diseases. * * * That the same principle "would justify the exclusion of *property dangerous to the* "*property of citizens of the state* * * * *or such use of prop-*"*erty as is injurious to the property of others.* They are self-"defensive. * * * While we unhesitatingly admit that a "state may pass sanitary laws for the protection of life, liberty "and property within its borders, while it may prevent persons "and animals suffering from contagious diseases from entering "the state, and establish quarantine and reasonable inspection "laws, it may not interefere with transportation into or through "the state beyond what is absolutely necessary for self pro-"tection."

The case at bar is not prohibitive. The statute meets the owners of cattle at the boundaries of the state without restriction or impediment and says: You may enter the state, traverse its length and breadth by railway or waterway, drive upon its highways, its unimproved or uncultivated lands; all

the avenues of egress and ingress are open to you, provided, that if you bring into the state cattle which have not been wintered one winter north of the southern line of Missouri or Kansas, you shall be liable for all damages which may be sustained by others by reason of your permitting your cattle to run at large, i. e., by reason of your permitting them to escape from your control and trespass on the enclosed and cultivated fields of the state.

Surely the jealous eyed Goddess of Commerce could ask no greater license, no larger liberty.

We respectfully submit that the questions certified by the court should be negatively answered and the case remanded, with instructions to the lower court to overrule the demurrer, and entertain plaintiff's petition.

I. N. FLICKINGER,
Attorney for Plaintiff in Error

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I. N. FLICKINGER,
Attorney for Plaintiff in Error

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JAMES. H. McKENNEY.
CLERK.

BRIEF OF DEFENDANTS IN ERROR.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1888.

No. 1254.

P. C. KIMMISH,

Plaintiff in Error.

vs.

JOHN J. BALL, AND
HENRY TIENKEN,

Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION, ON DIVISION OF OPINION.

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STATEMENT.

This case comes to this Court on a division of opinion from the United States Circuit Court, for the southern district of Iowa, western division. The precise question involved, and about which the Hon. J. M. Love, and the Hon. O. P. Shiras disagreed, are stated with such clearness and certainty that we think little more is required of us than to cite the sections of the statute of the State of Iowa, and the former rulings of this Court.

The plaintiff in error, P. C. Kimmish, commenced this action in the District Court of Harrison County, Iowa, against John J. Ball and Henry Tienken, to recover damages for bringing Texas cattle into said county during the period prohibited by the statute of said state, which on application of defendants, was removed to the United States Circuit Court for the southern district of Iowa, western division.

The plaintiff's petition is in words and figures following:

"PETITION."

"September Term, 1887."

"P. C. KIMMISH, Plaintiff,"

"vs."

"JOHN J. BALL AND HENRY TIENKEN, Defendants."

"For cause of action herein, plaintiff states that on or "about the 20th day of June, 1885, the defendants were the "owners of, and had in their possession and control, a herd of "Texas cattle, and that said cattle had not been wintered north "of the southern boundary of the states of Missouri or Kan-"sas, and were purchased at or near Ft. Smith, Arkansas, on

"or about June 20th, 1885; that said cattle being in possession "or under the control of the defendants, were allowed and per- "mitted by them to run at large in Union township, Harrison "county, Iowa, contrary to the provisions of Sec. IV., Chap. "185, of the acts of the Twelfth General Assembly, the same "being section 4059 of the Code of Iowa; that said cattle were "infected by a disease known as 'Texas cattle fever.' "

"That by reason of the premises said disease was spread "and disseminated among plaintiff's cattle, whereby they sick- "ened and died, and plaintiff has sustained damages in the sum "of five thousand dollars, for which amount, with interest and "costs, he prays judgment."

"S. H. COCHRAN, AND

"FLICKINGER BROS.,

"Attorneys for Plaintiff."

To which petition the defendants on the 30th day of September, 1887, filed a demurrer in words and figures following.

"DEMURRER."

"September Term, 1887."

"P. C. KIMMISH, Plaintiff,"

"vs."

"J. J. BALL AND HENRY TIENKEN."

"And now come the defendants and demur to plaintiff's "petition herein filed, upon the following grounds:"

"1st. That the matters and things alleged and set out in "said petition do not constitute any cause of action or ground "for recovery against these defendants or either of them, in "that they had a lawful and constitutional right to do all and

"singular the matters and things therein alleged against them."

"2nd. For that sections 4058 and 4059 of the Code of "Iowa, on which plaintiff's right of action in said court is bas- "ed, is in conflict with section VIII, article I, of the Constitu- "tion of the United States, in that the legislature of the State "of Iowa in said section undertook to regulate and interfere "with interstate commerce."

"3rd. For that by section VIII, article I, of the Consti- "tution of the United States the sole and exclusive right and "power is conferred upon the Congress of the United States, "to regulate commerce among the several states, and the pro- "visions of sections 4058 and 4059 of the Code of Iowa are an "attempt of the State of Iowa to interfere with the right to "regulate interstate commerce, exclusively conferred upon the "Congress of the United States."

"4th. For that it is provided by Section I, article I, of the "Bill of Rights of the Constitution of the State of Iowa, that "among the inalienable rights of men is that of acquiring pos- "sessing and protecting their property, and for that it is provi- "ded by section II article IV, of the Constitution of the "United States that each state shall be entitled to all the priv- "ileges and immunities of the citizens of the several states, and "sections 4058 and 4059 of the Code of Iowa are repugnant "to and in conflict with the aforesaid provisions of the Con- "stitutions of the State of Iowa and of the United States, in "that they create a disability which reaches to cattle in the "state of Texas and in the states south of the southern bound- "ary of Missouri and Kansas, without regard to their physical "condition, and does not relate to the same class of property in

"other states of the Union or owned by citizens of other "states of the Union."

"SAPP & PUSEY,
"Attorneys for Defendants."

The two sections of the Iowa statute drawn in controversy by this Demurrer will be found in the Code of 1880, and are in the following words:

"Sec. 4058. If any person bring into this State any "Texas cattle, he shall be fined not exceeding $1000.00 or "imprisoned in the county jail not exceeding thirty days, "unless they have been wintered at least one winter north of "the southern boundary of the State of Missouri or Kansas; "*provided*, that nothing herein contained shall be construed to "prevent or make unlawful the transportation of such cattle "through this State on railways, or to prohibit the driving "through any part of this State, or having in possession any "Texas cattle between the first day of November and the first "day of April following."

"Sec. 4059. If any person now or hereafter has in his "possession in this State any such Texas cattle, he shall be "liable for any damages that may accrue from allowing said "cattle to run at large, and thereby spreading the disease "among other cattle known as the Texas fever, and shall be "punished as is prescribed in the preceeding section."

These two sections comprise the whole of the Act as it passed the 12th General Assembly, and is designated as chapter 185, sections 1 and 2. By this it will be seen as well as by the reading of the two sections that one is dependent upon the other. No other statement need be made to advise the Court that the controversy between the parties in-

volves the constitutionality of the above Act of the Legislature, and that the learned Judges holding the Circuit Court were unable to agree as to whether it was constitutional or not.

BRIEF AND ARGUMENT.

We claim that this Act of the Legislature is unconstitutional and we think the questions involved in this case have heretofore been decided by this Court as well as by the Supreme Court of the State of Illinois. It is insisted that Sections 4058 and 4059 are divisible. Counsel for the plaintiff in error insists that while Section 4058 may be unconstitutional, Section 4059 is not, and a marked distinction is to be drawn between the two. Such a position, in our judgment is not sound. We think one section is made to depend upon the other and that section 4059 is not susceptible of enforcement, if constitutional, if section 4058 was wiped out or repealed. It provides that: "If any person now or hereafter has in his possession in this State any such Texas cattle." Who can tell what Texas cattle are referred to without looking to section 4058? Who knows what meaning is to be attached to the words, "such Texas Cattle," unless he first looks at section 4058 to see? But the section further provides that: "He shall be liable for any damages that may accrue by allowing said cattle to run at large." Who can tell what is meant by the words "said cattle," except as he is informed by the provisions of section 4058? The words "any such Texas cattle", and the further words, "said cattle", are material and important words in said section, without which it would be meaningless. "Any such Texas cattle", as well as the words "said cattle", have reference to the cattle designated and described in the

preceeding section. We think it quite clear that these two sections must stand or fall together.

The second ground stated in the demurrer is that the above sections of the Code of Iowa are in conflict with section 8, article 1 of the Constitution of the United States, which provides as follows: "Congress shall have power to regulate "commerce with foreign nations and among the several States "and with the Indian tribes." That both the above sections of the Iowa Statute are in violation of this provision of the Constitution was decided by this Court in the case of Railroad Company vs. Husen, 95 U. S. Reports, p. 469. This was a case of error to the Supreme Court of the State of Missouri involving the constitutionality of an Act of the Legislature of that State approved January 23, 1872. It is insisted by counsel for plaintiff in error that the Act of the Legislature of the State of Missouri is distinguishable from the Act of the Legislature of the State of Iowa. That the former is an absolute prohibition, while the latter is not. This distinction is untenable. The first section of the Missouri Statute prohibited any Texas, Mexican or Indian cattle being driven or otherwise conveyed into, or remaining in any county in the State between the first day ot March and the first day of November by any person or persons whomsoever, except cattle which had been wintered the entire winter previous in the State. The first section further permits such cattle to come across the line of the State, during the prohibited period, loaded upon a railroad car or steamboat that shall pass through the state without being unloaded, but provides for the liability of the railroad company or the owners of steamboats performing such transportation, and that they should be responsible for all damages which might result from the disease called

Spanish or Texas fever, should the same occur along the line of such transportation. A subsequent section of the Missouri Statute provides: "That if any person or persons should bring "into the State during the prohibited period any such cattle in "violation of the first section of the Act they should be liable "in all cases for all damages sustained on account of the dis- "ease communicated by said cattle."

There is but one difference that we can see between this Missouri Statute and the Iowa Statute and that is, the prohibited period is one month shorter in the Iowa than in the Missouri Statute. Section 4058 of the Iowa Statute is an absolute prohibition against bringing Texas cattle into the State of Iowa. It provides that if any person does so, he shall be fined not exceeding $1000, or imprisoned in the county jail not exceeding thirty days, unless they had been wintered one winter north of the southern boundary of Missouri or Kansas. The latter part of this section permits cattle to be shipped through the State on the railway, to be driven through any part of the State, and permits a person to have the same in possession between the first day of November and the first day of April following, but at no other time. If he does so he is subjected to the pen alty above stated, and section 4059 is identical in its provisions except that it gives a party the right of civil action for damages sustained. The criminal provisions are alike in both of these sections; the time Texas cattle are allowed to be shipped into the State is alike in both sections. The only material difference between them is the right of civil action to recover damages. A fair analysis of the Iowa Statute will show it to be more obnoxious to the above provisions of the Constitution than the Missouri Statute. If the Missouri Statute is unconsti-

tutional, as it has been held by this Court to be, the Iowa statute must be unconstitutional also. The Missouri case was a civil action to recover damages. This case is the same. The provision of the Missouri statute as to when damages might be recovered, and the Iowa statute are alike, we think, in every essential particular. All effort to discriminate between the two statutes must be fruitless. The prohibition of Texas cattle has been resorted to by the legislatures of almost all the northwestern states, and the provisions of all of them are in all essential respects in substance the same. But few of the states have been called upon to determine the constitutionality of these statutes. Missouri held her statute to be constitutional. The Supreme Court of Illinois did the same thing until the Missouri statute was held by this Court to be unconstitutional. The constitutionality of the Illinois statute was passed upon by the Supreme Court of that state in the case of Yeasel vs. Alexander, 58 Ill., 254. This case was commented upon by this Court in the case of Railroad Company vs. Husen above cited and was admitted to be a case at variance with the views reached by this Court. The constitutionality of the Illinois statute was next drawn in question by the Supreme Court in the case of Emanuel Salzesntein, et al., vs. Wm. Mavis, reported in 91, Ill., 391. This question was again before that Court in the case of the Chicago & Alton Railroad Co. vs. Charles H. Erickson, 91, Ill., 630, and again in the case of Wm, W. Jarvis, et al., vs. Ignatius Riggin, 94, Ill., 164. In all these cases the Supreme Court of that state ignored and overruled the case of Yeazel vs. Alexander holding that the decisions of this Court construing the Constitution of the United States were binding upon all the Courts of the land. The extent to which they recognized this decision of Railroad vs. Husen as going, will be examined hereafter.

The cases decided by the Supreme Court of the State of Illinois were all of them civil actions. Two of them were brought to recover damages, because the disease known as Texas fever had been communicated to the plaintiffs' cattle.

In the case of Emanuel Salzenstein, et. al., vs. Wm. Mavis, decided by the Supreme Court of the State of Illinois, Mr. Chief Justice Craig who delivered the opinion of the Court among other things says: "The declaration was, doubt-"less, framed under the provisions of an Act to amend an Act "entitled, an Act to prevent the importation of Texas and "Cherokee cattle into the state of Illinois (Rev. Statute 1874, "141); the first section of which declares; 'That it should "not be lawful for any person or persons, Railroad Company "or other corporation, or any association of persons, to bring "into this state any Texas or Cherokee cattle, except between "the first day of October and the first day of March following "of each year.' The second section provides; 'That it shall not "be lawful for any person or persons, or Railroad Company "or other corporation or association of persons whatever, "within this state, to own or have in possession, or control, "any Texas or Cherokee cattle, at any time, except between "the first day of October and the first day of March following "of each year.'"

The first thing done by the Supreme Court in this opinion is to comment upon and overrule the former decision of that Court in the case of Yeazel vs. Alexander, in which said statute was held to be constitutional. This is done on authority of the case of Railroad Company vs. Husen. An effort was made to discriminate between that case and the one decided by this Court as is attempted in this case, but the Chief Justice replied to that in the following manner: "It is,

"however, contended by plaintiff that the facts averred in the "second and third counts of the declaration distinguishes this "case from the Hannibal & St. Joseph Railroad company vs. "Husen, in this: that these counts proceed on the theory that "the defendants owned or had in possession cattle in this state, "the ownership or possession whereof in this state was pro- "hibited by our statute, while in the case cited the Missouri "statute prohibited the transportation of cattle from other "states through the State of Missouri." (This is precisely the point raised by counsel for plaintiff in error, and the Chief Justice of the Supreme Court of Illinois disposes of it in the following manner:) "We cannot, however, understand how "the right to transport and bring into this state Texas cattle, "can be exercised, if the owning or possessing of such cattle "within the state is prohibited. The right to transport from "another state into this state, necessarily includes the right of "possession and ownership in the state. If the latter is pro- "hibited, the former right must fall with it. If the legislature "has the constitutional right to declare that a person shall not "possess or own a certain kind of property within the state "which may be raised or produced in another state of the "union, it logically follows that all inter-state commerce in "such property is both regulated by the legislature and pro- "hibited. We do not understand that the legislature can do, "indirectly, that which the constitution of the United States "prohibits to be done, directly. Such, however, would be the "case if the theory of the plaintiff in this case was sanctioned. "Under the decision cited, which must control this case, we "perceive no tenable grounds upon which the judgment can "be sustained. It will, therefore, be reversed, and the cause "remanded."

The next case decided by the Supreme Court of the State of Illinois was the case of the Chicago & Alton Railroad Company vs. Charles H. Erickson, use, etc. This was an action brought against the railroad company to recover damages for failing to transport Texas or Cherokee cattle in obedience to the statute of the State of Illincis. The agent in refusing to receive and ship the cattle stated as the reason for so refusing, that they were Cherokee cattle and that his superiors had instructed him not to receive and ship such cattle. These common carriers were held responsible for the damages sustained by the party to his cattle. In passing upon this case, Justice Scholfield makes use of the following language:

"This question is one upon which the decision of the Su-
"preme Court of the United States is paramount, and we
"are in duty bound to follow its rulings, however much we
"may in opinion disagree with them. We have at the present
"term followed the decision in Husen's case. The Act,
"being void for repugnancy to the Constitution of the United
"States, can neither be regarded as imposing obligations nor
"affording protection. There being no reasonable excuse in
"legal contemplation, shown for the refusal to carry, the judg-
"ment below must be affirmed."

We especially invite the attention of this Court to the case of William W. Jarvis, et al., vs. Ignatius Riggin above cited. As the case is a short one, we quote it in full as follows:

"Per Curiam: Appellee brought an action on the case,
"against appellants, to recover damages sustained by appellee,
"claimed to have been occasioned by reason of the disease
"called 'Texas fever' being communicated to his cattle by ten
"head, or some of them, sold by appellants to appellee; that
"appellants sold the ten head to appellee, at the time falsely

"representing that the cattle were from southwest Missouri "and were entirely free from disease, and that they would not "communicate disease to other cattle; that in fact the cattle "were Cherokee cattle, and were in such a condition as to "communicate disease to other cattle; that relying upon these "representations, appellee turned the cattle so purchased into "his pasture with other cattle which he owned, ten of which "contracted disease from them, and eight of the number died, "and the loss was thereby sustained."

"This is the *gravamen* of the complaint, differently stated "in various counts of the declaration. A demurrer was sus- "tained to all but the first count, and leave given to amend. "Another demurrer was sustained to all but the fourth and "seventh counts as amended. It was agreed by the parties "that the cause be tried as though the plea of the general is- "sue had been filed. A trial was had by the Court and a jury, "and a verdict for plaintiff. A motion for a new trial was "overruled, and judgment rendered for $175 and costs. De- "fendants perfected an appeal to this Court, and now urge a "reversal."

"The questions presented in this record have been decid- "ed in Railroad Co. vs. Husen, 95, U. S. R., 465. In that "case, the law under which this action is brought was held to "be unconstitutional. And in the case of Salzenstein, et al., "vs. Mavis, 91, Ill., 391, which was a case similar to this, we "held we were bound by the decision of the Supreme Court "of the United States, and conformed our decision to that of "the Supreme Court. Those cases are decisive of this, and "the judgment of the Court below must be reversed."

We have made quotations from the cases cited far in ex-

cess of what we would have done, were it not that counsel for plaintiff in error, insists quite strenuously that the case at bar is distinguishable from the case of Railroad vs. Husen. Our purpose in doing so has principally been to show the extent to which that decision goes as viewed from the standpoint of the Supreme Court of the State of Illinois, the only Court of final resort that has had occasion to consider how far the case of Railroad company vs. Husen, goes. The ground taken by counsel is that sections 4058 and 4059 are but police regulations and therefore not unconstitutional, and in furtherance of that position he insists that the Missouri statute was prohibitory, and that the Iowa statute is not. All that is necessary in our opinion to refute this position is to call attention to the plain reading of the case of Railroad company vs. Husen, as the Court in that case expressly held it not to be a police regulation. The decisions of the Supreme Court of the State of Illinois determined the same question in the same way. In all of these decisions it is difficult to see how counsel for plaintiff in error expects to sustain his position, that the Iowa statute is but a police regulation. It is somewhat singular that counsel should refer to the case of Railroad company vs. Husen, as an authority in his favor, for we do not see how it is possible to maintain his position without first completely ignoring and disapproving that case in all its bearings. It is fully and clearly an authority in our favor in every particular, and goes much further than is necessary to sustain the unconstitutionality of the law under consideration. If that case and the Illinois cases above cited are sound, and, of that there is no doubt, we submit that we have reached the end of the controversy in this case.

The two sections of the Iowa statute under consideration

have been recognized generally by the Bar, by the Courts, and by the people in Iowa as being unconstitutional since the decision of the case of the Railroad Company vs Husen. As evidence of this, we call attention to the fact that the Twenty-first General Assembly of the State of Iowa repealed the two sections in question and substituted two others in lieu thereof, which was thought by the Legislature to obviated the obnoxious character of the former statute. Sections 4058 and 4059 are expressly referred to and other sections substituted in lieu thereof. (See Chapt. 156, Acts of the 21st General Assembly of the State of Iowa.)

This legislation was brought about in consequence of indictments found and presented by the Grand Juries of Harrison and Pottawattamie Counties against the defendants in error. They were first indicted by the Grand Jury of the District Court of Harrison County under section 4058. To that indictment a demurrer was interposed on the ground that that section of the law was unconstitutional, and on authority of Railroad Company vs. Husen, the District Court of that county sustained a demurrer to the indictment. At the same term of the District Court at which the demurrer was sustained, another indictment was found by the Grand Jury of that county under Sec. 4059 thinking thereby to avoid the force of the objections made to the indictment under section 4058. To that indictment a demurrer was interposed on the same ground, which after full argument was sustained by the District Court. An indictment was also found by the Grand Jury of the District Court of Pottawattamie County against the defendants in error under section 4059. To that indictment a demurrer was also interposed on the ground that that section of the statute was unconstitutional, which, after

full argument was sustained by the District Court of Pottawattamie County, holding that said section of the statute was unconstitutional.

These are the only instances where the constitutionality of the Iowa statute has been drawn in question and passed upon, that we are aware of, and these adjudications do not appear of record, but they are true, nevertheless, just as stated.

From the foregoing, it has been determined by the Supreme Court of the United States in the case of Railroad Company vs. Husen, in three decisions by the Supreme Court of the State of Illinois, above referred to, and by the only judicial decisions in the State of Iowa, and by the legislature of said state, that the law in question was unconstitutional and in conflict with Sec. 8, Art. 1, of the Constitution of the United States. We are not required to state the reasons for this conclusion because they have been stated by this Court and the Supreme Court of Illinois, with more clearness and force than we are capable of doing. We insist that the discrimination or prohibition or burden laid upon Texas cattle, is a direct interference with commerce among the states. It is the discrimination against Texas cattle, or cattle produced in Texas, that makes the Act unconstitutional, and not that it is directed against the citizens in the State of Texas. The buying, having in possession and transporting of Texas cattle, is commerce itself, and any interference with it or attempt to regulate it in any manner or form, is in conflict with the above provision of the Constitution; for the right to do so, by the Constitution, is lodged in the Congress of the United States, and the right of Congress in all these regards is exclusive. There is but one case referred to by counsel for plaintiff in error that has any bearing upon this question, and that is the case of the

Missouri Pacific Railroad Company vs. Finley, decided by the Supreme Court of the State of Kansas. We think this case is distinguishable from the case at bar, but if it is not, the reasoning upon which it is based, *i. e.*, that the Act of the legislature of that state is only the exercise of a police power, is in direct conflict with the cases we have cited. If the case is in conflict with the case of the Railroad Company vs. Husen, the indifference of the Supreme Court of the State of Kansas to the decisions of the highest Court of the land and the refusal to follow the same, should be condemned instead of supported.

We wish now to briefly call attention to the 4th ground of demurrer, which is that the Act is in conflict with Sec. 2, Art. 4 of the Constitution of the United States which provides, that: "The citizens of each state shall be entitled to all the "privileges and immunities of the citizens of the several states." Under this provision of the Constitution of the United States, the citizens of Texas have the same right to bring their cattle into the state of Iowa and there keep or sell or dispose of the same, that the citizens of the other states have. They have the same right to bring their cattle from the State of Texas into the State of Iowa for barter and sale, as well as for all other purposes, that the people of the State of Nebraska, Minnesota, Wisconsin and Illinois have, and any prohibition of that right is in conflict with the above provision of the Constitution of the United States. A law which prohibits or lays burdens upon cattle produced in the State of Texas and brought here by the citizens of that state, which is not laid upon the cattle produced by the citizens of the several states and brought into the State of Iowa, is an interference with and a limitation upon the rights of the citizens of the State of Texas. If that is tolerated, the citizens of the State of Texas are not entitled here in the State

of Iowa to all the privileges and immunities of the citizens of the several states. A law that prohibits a citizen of the State of Texas from bringing his cattle into the State of Iowa, or creates liabilities or burdens upon his keeping them within said state, and extends to the citizens of all the other states the right to do so without any burden or penalty, is a law that forbids the citizens of the State of Texas from having all the privileges and immunities of the citizens of the several states, and for that reason is repugnant to Sec. 2, Art. 4, of the constitution of the United States. For these reasons, we insist that the statute of the State of Iowa under consideration is not only a violation of Sec. 8, Art. 1; but also Sec. 2, Art. 4, of the Constitution of the United States.

All cattle were free commoners throughout the county of Harrison at the time the cattle of the defendants in error are alleged to have been permitted to run at large Prior to that time the Legislature of the State of Iowa had a law for the submission of the question, requiring owners of cattle to herd the same, to the people of each county; where they voted in favor of the same it was to be the law, where they voted against it the cattle were to be and remain free commoners. Harrison county had not up to and prior to that time adopted what is called the herd law. It was lawful for cattle to run at large. We maintain that it was as lawful for defendants' cattle to run at large, as it was for the cattle of any other citizen of Harrison County. That the suit in this case is based upon the Iowa statute cannot be questioned; indeed that statute is referred to by the plaintiff in his petition and is made the basis of his action. It is for violating that statute that plaintiff in his petition bases his right to recover, but it is insisted that this section 4059 of the Iowa statute is not pro-

hibitory in its terms and this induces us to present one other view of that section. The legislature in that section refers to "such Texas cattle" and "said cattle," and to understand the meaning of these terms, reference must be had to the preceeding section. Section 4059 must, we think, be read asfol lows; it can mean nothing less: If any person have in his possession in this state any Texas cattle which have not been wintered at least one winter north of the southern boundary of the State of Missouri or Kansas, and which are not brought into the State between the first day of November and the first day of April following, and allows the same to run at large and thereby communicates Texas fever to other cattle; he shall be punished for so doing by a fine not exceeding one thousand dollars or imprisioned in the county jail not exceeding thirty days, and shall be liable for any damage that may accrue from allowing said cattle to run at large and thereby spreading the disease among other cattle, known as the Texas fever. This is the plain meaning and signification of that section, and if it is not as obnoxious to the Constitution of the United States as the Missouri or Illinois statute we would like some one to point out to us a reason why it is not.

Counsel claims in his brief, that the meaning of "such" in the first section signifies the same as it means where it is employed in section 4059. Suppose it does, how does that aid him in his claim that the statute is constitutional. "Such cattle" as used in the first section means any Texas cattle, and is coupled with the provision as to when they may be transported through the state; it can refer to nothing but such Texas cattle, and the way it is used in the second section has reference to the same thing, that is, any Texas cattle brought into this state. It means precisely the same thing as the sec-

tion read, as we have above caused it to be. Counsel's suggestion as to the word "such" in section 4058, we think, is without force.

Counsel in his printed brief cites a great many authorities on different topics, the materiality of which we are unable to see. The question and the only question in this case, is as to whether the Iowa statute is repugnant to the Constitution in the respects pointed out by the demurrer. We think, on examination, it will be found that but one authority cited by him has any bearing or force, and that is the decision of the Supreme Court of the State of Kansas. All others are foreign to the matter in dispute. What the common law was as to cattle running at large, is immaterial. These cattle under the laws of the State of Iowa as well as all other cattle, had the right to run at large, as there was no law to restrain cattle from so doing, in Harrison county. The various decisions referred to as to the police powers of the state, we apprehend, are not material as authorities in the case at bar, as this Court has determined that the Act of the legislature is not a police regulation. For these reasons we have not attempted to analyze them, believing such a work unnecessary.

SUMMARY.

We have confined ourselves to citing this Court to cases directly in point. The case of Railroad Company vs. Husen was an action to recover damages for shipping cattle through the State of Missouri during the prohibited period by which cattle along the route were infected with the disease called Texas fever. The right to recover was based directly on the Missouri statute. The Supreme Court of Missouri held their statute to be a police regulation and therefore constitutional,

while this Court held it was not a police regulation and was in derrogation of the Constitution and for that reason null and void. That it was not only an interference with but a prohibition of commerce and in utter disregard of Sec. 8, Art 1 of the Constitution.

The case of Salzenstein, et al., vs. William Mavis decided by the Supreme Court of Illinois, was an action to recover damages because cattle purchased by the plaintiff from the defendant communicated the Texas fever to his, the plaintiff's cattle, basing his right to recover upon a statute of that state similar to the statute of Iowa, but the Supreme Court of Illinois held their statute to be unconstitutional, and that plaintiff had no right to recover.

In the case of the Chicago & Alton Railroad Company vs. Erickson decided by the Supreme Court of Illinois and above referred to, the plaintiff brought his action to recover damages because the railroad company refused to ship his cattle in obedience to the statute of Illinois. In that case the Supreme Court held the law to be unconstitutional; that it was the duty of the railroad company to ship the cattle without regard to the statute and that it was liable to the plaintiff for damages for not doing so.

The case of Jarvis vs. Riggin decided by the Supreme Court of Illinois was an action to recover damages because the defendant's cattle had communicated the disease called Texas fever to the plaintiff's cattle. He recovered in the court below, but the Supreme Court reversed the judgment holding that the statute was unconstitutional, and was in conflict with Sec. 8, Art. 1, as construed and decided by this Court in the case of Railroad Company vs. Husen. The Iowa statute is now and has been recognized by our own courts, the legislature, and the public generally as unconstitutional,

since the decision by this Court in the case above cited.

In the light of these decisions we insist that the statute of Iowa is unconstitutional and void. These decisions and the reasoning upon which the same were based leads us to the following conclusions: First—The state has no power to attempt to regulate or interfere with inter-state commerce. Second—A law excluding from the state during many months of the year cattle coming from another state is an attempt to regulate commerce and is void. Third—While a state has the power to make police regulations, it can not be exercised on a subject confided exclusively to Congress by the Constitution. Fourth—A law prohibiting the bringing into the state or having in possession Texas or Cherokee cattle is not a quarantine or inspection law nor is it within the police power of the state; it is an attempt to exercise a power confided exclusively to the Congress of the United States. Fifth—An act prohibiting a citizen from having in possession and control Texas or Cherokee cattle and making him liable if he does so for damages sustained by their communicating disease to domestic cattle, is the exercise of a power vested exclusively in Congress by the Constitution. Sixth—The power to regulate commerce among the states is vested exclusively in the Congress ot the United States and no state has any control, whatever, over it.

With these citations, considerations, and suggestions we submit this case, confidently believing that the statute in question is unconstitutional and void; that no action can be maintained, civil or criminal, based thereon and that this conclusion will be reached by this Court.

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